

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN D. WATSON,)	
)	CASE NO. C10-73-JCC
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
MICHAEL J. ASTRUE, Commissioner of)	
Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Susan D. Watson appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her application for a period of disability and Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-33, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was born in 1957 and was 50 years old at the time of the hearing before the ALJ. (Administrative Record (“AR”) 923.) She has a high school education. (AR 188,

01 924.) Her past work experience includes employment as a dishwasher, cashier, and dietary
02 aide. (AR 205-207.)

03 Plaintiff asserts that she is disabled due to Crohn's disease, a head injury, and arthritis.
04 (AR 449-51.) She asserts an onset date of March 31, 1996. (AR 383.) Because there is a
05 prior, administratively final, unfavorable decision, the relevant period for review in this case is
06 April 29, 1999, one day after the prior decision was issued, through March 30, 2002, plaintiff's
07 date last insured. (AR 122, 124.)

08 The Commissioner denied plaintiff's claim initially and on reconsideration. (AR 122.)
09 Plaintiff requested a hearing, which took place on March 18, 2008. (AR 918-42.) On June 6,
10 2008, the ALJ issued a decision finding the plaintiff not disabled. (AR 122-32.) Plaintiff's
11 administrative appeal of the ALJ's decision was denied by the Appeals Council (AR at 8-11),
12 making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42
13 U.S.C. § 405(g). On January 12, 2010, plaintiff timely filed the present action challenging the
14 Commissioner's decision. (Dkt. 3.)

15 II. JURISDICTION

16 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
17 405(g) and 1383(c)(3).

18 III. STANDARD OF REVIEW

19 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
20 social security benefits when the ALJ's findings are based on legal error or not supported by
21 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
22 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is

01 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
02 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
03 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical
04 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
05 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it
06 may neither reweigh the evidence nor substitute its judgment for that of the Commissioner.
07 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to
08 more than one rational interpretation, it is the Commissioner's conclusion that must be upheld.
09 *Id.*

10 IV. DISCUSSION

11 The Commissioner follows a five-step sequential evaluation process for determining
12 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
13 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had
14 not engaged in substantial gainful activity since her alleged onset date through her date last
15 insured. (AR 124.) At step two, it must be determined whether the claimant suffers from a
16 severe impairment. The ALJ found the plaintiff had the following medically determinable
17 impairments: pregnancy, obesity, subclinical hypothyroidism, learning disorder, and history
18 of partial seizure disorder. *Id.* However, the ALJ determined that plaintiff did not have a
19 severe impairment or combination of impairments that significantly limited her ability to
20 perform basic work-related activities prior to her date last insured. (AR 124-25.) Having
21 made that finding, the ALJ ended his inquiry. The ALJ concluded plaintiff was not under a
22 disability at any time from March 31, 1996, through March 30, 2002. (AR 131-32.)

01 Plaintiff argues that the Commissioner (1) erred in finding she had no severe
02 impairments prior to her date last insured; and (2) failed to provide clear and convincing
03 reasons for rejecting her testimony regarding her obesity limitations. (Dkt. 14 at 7-13) She
04 requests remand for an award of benefits, or, alternatively, for further administrative
05 proceedings. *Id.* at 13-14. The Commissioner argues that the ALJ's decision is supported by
06 substantial evidence and should be affirmed. (Dkt. 15.) For the reasons described below, the
07 Court agrees with the plaintiff.

08 A. Step Two Severity Analysis

09 At step two, a claimant must make a threshold showing that her medically determinable
10 impairments significantly limit her ability to perform basic work activities. *See Bowen v.*
11 *Yuckert*, 482 U.S. 137, 145, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); 20 C.F.R. §§
12 404.1520(c), 416.920(c). "Basic work activities" refers to "the abilities and aptitudes
13 necessary to do most jobs," including walking, standing, sitting, lifting, pushing, pulling,
14 reaching, carrying, handling, seeing, hearing, speaking, understanding, carrying out and
15 remembering simple instructions, using judgment, and dealing with changes in a routine work
16 setting. 20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of
17 impairments can be found 'not severe' only if the evidence establishes a slight abnormality that
18 has 'no more than a minimal effect on an individual's ability to work.'" *Smolen v. Chater*, 80
19 F.3d 1273, 1290 (9th Cir. 1996)(quoting Social Security Ruling ("SSR") 85-28). "[T]he step
20 two inquiry is a de minimis screening device to dispose of groundless claims." *Id.* (citing
21 *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the "combined effect" of an
22 individual's impairments in considering severity. *Id.*

01 As indicated above, the ALJ found plaintiff had the following medically determinable
02 impairments: pregnancy, obesity, subclinical hypothyroidism, learning disorder, and history
03 of partial seizure disorder. (AR 124.) However, the ALJ determined that plaintiff's
04 medically determinable impairments did not significantly limit her ability to perform basic
05 work-related activities prior to her date last insured and therefore were not severe. (AR
06 124-25.)

07 Plaintiff argues that the ALJ's step two finding "conflicts with the findings of the State
08 agency medical specialists who reviewed Plaintiff's case at the initial and reconsideration
09 levels, which is evidence the ALJ purported to rely upon." (Dkt. 14 at 7.) Specifically,
10 plaintiff argues that the ALJ's finding conflicts with the opinion of the state agency medical
11 specialist Robert Bernardez-Fu, M.D., who determined that plaintiff's pregnancy, obesity, and
12 history of seizure disorder limited her to the light exertional level. (AR 476-83, 647).
13 Plaintiff contends that the fact that Dr. Bernardez-Fu limited her to light work demonstrates her
14 impairments cause more than minimal limitations in functioning and are therefore severe.
15 (Dkt. 14 at 8.) Plaintiff also argues that the ALJ's finding conflicts with the Commissioner's
16 April 28, 2006, decision denying her claim for benefits on reconsideration which stated that
17 plaintiff had "a history of seizure disorder which prevented [her] from performing [sic]
18 hazardess type of work," and that "[t]he evidence shows that [she] did have some lifting
19 limitations which prevented [her] from performing [her] past work." *Id.* (citing AR 366).
20 Again, plaintiff contends that the Commissioner's findings show that her impairments caused
21 more than minimal limitations in functioning and are therefore severe. *Id.* The
22 Commissioner responds that plaintiff failed to carry her burden of proving that her impairments

01 significantly limit her ability to perform basic work activities. (Dkt. 15 at 7-10.) The Court
02 disagrees with the Commissioner.

03 As set forth in the Commissioner's own regulations, a severe impairment or
04 combination of impairments exists when the evidence establishes "more than a minimal effect
05 on an individual's ability to work." SSR 85-28 (citing 20 C.F.R. §§ 404.1520, 404.1521,
06 416.920(c), 416.921); *see also* SSR 96-3p. The prevailing view is that only a "slight
07 abnormality" or combination of slight abnormalities that minimally affect an individual's
08 ability to work can be considered non-severe. *See, e.g., Smolen*, 80 F.3d at 1290. Thus, the
09 regulatory severity test is quite lenient, and is generally employed only as an administrative
10 convenience designed to screen out totally groundless claims. *Id.* An overly stringent
11 interpretation of the severity requirement violates the statutory standard for disability. *Id.*

12 Here, the medical evidence shows that plaintiff had an impairment diagnosed as a
13 seizure disorder, partial seizure disorder, and a history of seizures or spells which caused her to
14 fall down, an impairment which is not so slight or minimal that it would not interfere with the
15 plaintiff's ability to perform basic work activities. (AR 308-11, 558-71.) As the DDS
16 reviewers found, plaintiff's seizure disorder precludes her from working in and around hazards
17 such as machinery and heights. (AR 476-83, 366, 647.) The DDS reviewers also found
18 plaintiff had exertional limitations and could lift no more than 20 pounds occasionally and 10
19 pounds frequently. (AR 477, 366, 647.)

20 In concluding that plaintiff had no severe impairments prior to her date last insured, the
21 ALJ adopted the opinions of the State agency medical consultants. (AR 130.) However, as
22 the plaintiff contends, the ALJ's conclusion is contrary to the evidence he purportedly relied

01 upon. There was in fact medical evidence from Dr. Braun and other providers which showed
02 that plaintiff suffered from spells as often as once or twice a month (although, as plaintiff
03 concedes, not at the frequency she testified to at the hearing). (AR 127, 308-14, 565, 560-71.)
04 The ability to lift and carry only 10 pounds frequently and 20 pounds occasionally coupled with
05 the inability to work in and around hazards, are the same as a significant limitation on one's
06 physical "abilities . . . to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). Thus, the
07 medical record includes evidence of problems sufficient to pass the de minimis threshold of
08 step two. Accordingly, the ALJ's decision that plaintiff did not have a severe impairment prior
09 to her date last insured is not supported by substantial evidence and must be reversed.¹

10 The Commissioner argues that the medical evidence relied on by the ALJ merely limits
11 plaintiff from performing heavy and medium work, and that "basic work activities" does not
12 mean plaintiff must be able to perform at all exertional levels of work. (Dkt. 15 at 9-10.)
13 However, the fact that plaintiff may be able to perform light work is irrelevant at the step two
14 inquiry. It appears the ALJ may have conflated the step two severity analysis with the step
15 four residual functional capacity analysis. Under the regulations the test is not whether
16 plaintiff can do "most jobs," but rather whether the impairment has significantly limited her
17 abilities to do any one or more of the basic work activities necessary to do most jobs. 20

18
19 ¹"Credibility determinations do bear on evaluations of medical evidence when an ALJ is
20 presented with conflicting medical opinions or inconsistency between a claimant's subjective
21 complaints and his diagnosed conditions." *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir.
22 2005). Here, however, there was sufficient consistency between plaintiff's complaints, though
somewhat exaggerated, and her doctor's reports and diagnoses to meet the de minimis standard
at step two. *See id.*; *cf. Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005)(finding no disability
at step two where the claimant's doctor was hesitant to conclude that any of the claimant's
symptoms and complaints were medically legitimate).

01 C.F.R. §§ 404.1521(b), 416.921(b).

02 The Commissioner also argues that the plaintiff did not report seizures or further spells
03 after 2001, despite not taking any medications. (Dkt. 15 at 11.) However, as plaintiff argues,
04 the undisputed medical evidence shows that she suffered from seizure spells which caused her
05 to fall between April 1999 and August 2001, and that the ALJ should have considered her
06 seizure disorder a severe impairment for at least a closed period from April 1999 through
07 August 2001. (Dkt. 14 at 9-10.) On remand, the ALJ should reevaluate whether plaintiff's
08 impairment(s) or combination of impairments were severe through her date last insured, and
09 alternatively, whether plaintiff's impairment(s) or combination of impairments were severe
10 during the closed period between April 1999 and August 2001.

11 Finally, the Commissioner contends that plaintiff voluntarily discontinued her
12 anti-seizure medication in order to get pregnant and did not reinstate it after having her child.
13 (Dkt. 15 at 11.) The Commissioner argues impairments that can be controlled effectively with
14 medication are not disabling for the purposes of determining eligibility for disability benefits.
15 *Id.* Again, the Court disagrees with the Commissioner. The records show that plaintiff
16 discontinued her anti-seizure medication in May 1999 on the recommendation of her treating
17 physician Frederic Braun, M.D., in order to get pregnant. (AR 565, 570, 571.) Plaintiff
18 subsequently became pregnant and gave birth in April 2000. In June 2000, Dr. Braun
19 expressed doubt over whether plaintiff's continued falling spells were actually seizures and
20 directed her to keep a diary of her spells. (AR 561.) In May 2001, Dr. Braun recommended
21 that plaintiff be seen by a cardiologist, noting plaintiff's spells "sound mainly more
22 cardiovascular than seizures." (AR 559, 560.) In August 2001, cardiologist Stephen A.

01 Malone, M.D., assessed “[s]pells, possible syncope,” but ordered further testing to rule out a
02 cardiac source. (AR 558.) In November 2001, Dr. Malone noted “he was unable to uncover a
03 cardiac source for Ms. Watson’s symptoms.” (AR 549.) The record shows that plaintiff did
04 not report symptoms after August 2001. (AR 127, 506.) Thus, contrary to the
05 Commissioner’s argument, there is no evidence that plaintiff’s impairment would have been
06 adequately controlled by anti-seizure medication (had Dr. Braun prescribed it) because it was
07 unclear whether plaintiff’s reported spells were seizures or seizure related. Accordingly, the
08 Commissioner’s argument must be rejected.

09 1. Obesity

10 Plaintiff argues that the ALJ erred by finding her obesity to be non-severe at step two.
11 (Dkt. 14 at 11-13.) At the hearing, the plaintiff testified that she weighed 224 pounds, which
12 limited her ability to walk and exercise, and that since 1998, she has been unable to walk more
13 than half a block without resting. (AR 937-40.) The ALJ rejected plaintiff’s testimony
14 regarding her obesity related limitations for two reasons. Both of the ALJ’s reasons are
15 improper.

16 If an ALJ finds a claimant’s testimony regarding the severity of her impairments is
17 unreliable, “the ALJ must make a credibility determination with findings sufficiently specific to
18 permit the court to conclude that the ALJ did not arbitrarily discredit claimant’s testimony.”
19 *Thomas*, 278 F.3d at 958. The ALJ may consider “ordinary techniques of credibility
20 evaluation,” including the claimant’s reputation for truthfulness, inconsistencies in testimony
21 or between her testimony and conduct, daily activities, work record, and the testimony from
22 physicians and third parties concerning the nature, severity, and effect of the symptoms of

01 which she complains. *Smolen*, 80 F.3d at 1284.

02 Here, the ALJ rejected plaintiff's testimony because she had failed to lose weight
03 despite her doctor's recommendations. (AR 127.) The ALJ stated that "[t]he claimant
04 repeatedly reported her inability to lose weight, but it was noted that she had a history of poor
05 compliance with treatment. She was encouraged to engage in an increased aerobic exercise
06 program." (AR 127.) The ALJ noted that "[i]t is doubtful that the claimant's physician
07 would recommend exercise if she were truly as limited as she alleges." (AR 130.)

08 A claimant's failure to follow treatment is not a proper reason to reject a claimant's
09 testimony regarding her obesity. *See Orn v. Astrue*, 495 F.3d 625, 636-37 (9th Cir.
10 2007)(citing SSR 02-1p; 20 C.F.R. §§ 404.1530, 416.930). As the Ninth Circuit instructs:

11 Before failure to follow treatment for obesity can become an issue in a case, we
12 must first find that the individual is disabled because of obesity or because of
13 obesity and another impairment(s). Our regulations at 20 CFR 404.1530 and
14 416.930 provide that, in order to get benefits, an individual must follow treatment
15 prescribed by his or her physician if the treatment can restore the ability to work,
16 unless the individual has an acceptable reason for failing to follow the prescribed
17 treatment. We will rarely use "failure to follow treatment" for obesity to deny or
18 cease benefits.

15 . . .

16 When a treating source has prescribed treatment for obesity, the treatment must
17 clearly be expected to improve the impairment to the extent that the person will not
18 be disabled. . . . The goals of treatment for obesity are generally modest, and
19 treatment is often ineffective. Therefore, we will not find failure to follow
20 prescribed treatment unless there is clear evidence that treatment would be
21 successful.

19 *Id.*

20 In the instant case, the ALJ did not first find that plaintiff is disabled because of obesity
21 or because of obesity and another impairment. *See id.* Furthermore, there is no evidence that
22 Dr. Braun directed plaintiff to lose weight as part of a prescribed treatment, or that the

01 prescribed treatment would have been successful. *See id.* Rather, it appears that Dr. Braun
02 merely recommended that plaintiff get more exercise. (AR 127, 130, 518.) “A treating
03 source’s statement that an individual ‘should’ lose weight or has ‘been advised’ to get more
04 exercise is not prescribed treatment.” SSR 02-1p. Thus, the ALJ erred by finding plaintiff
05 not credible due to her failure to lose weight.

06 The ALJ also rejected plaintiff’s testimony because she was able to care for two foster
07 children, a niece sometimes, and her son. (AR 130.) The ALJ noted that the “physical and
08 mental abilities required by caring for infants and young children are inconsistent with an
09 inability to perform all work activity, and render questionable the claimant’s allegations of
10 debilitating physical limitations and staying in bed all day.” (AR 130.) ““This court has
11 repeatedly asserted that the mere fact that a plaintiff has carried on certain daily activities . . .
12 does not in any way detract from her credibility.”” *Orn*, 495 F.3d at 639 (citing *Vertigan v.*
13 *Halter*, 260 F.3d 1044, 1055 (9th Cir. 2001)). Daily activities may be grounds for an adverse
14 credibility finding *only* ““if a claimant is able to spend a substantial part of his day engaged in
15 pursuits involving the performance of physical functions that are transferable to a work
16 setting.”” *Id.* (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

17 Here, there is no evidence that plaintiff was able to spend a “substantial” part of her day
18 engaged in activities that were “transferrable to a work setting.” *See Fair*, 885 F.2d at 603.
19 Moreover, as plaintiff contends, the fact that she was able to care for children does not
20 contradict her testimony that she has difficulty walking and is unable to walk more than half a
21 block without resting. (Dkt. 14 at 12 n.1.) Plaintiff’s mother’s Third Party Function Report
22 further corroborated plaintiff’s testimony that she has difficulty walking more than a couple

01 blocks before needing to rest. (AR 409.) Although the ALJ found the report showed plaintiff
02 is “less limited than she alleges, given that she is able to drive a car, shop, prepare simple meals,
03 and care for a young child,” (AR 131), the mere fact that plaintiff has carried on certain daily
04 activities such as grocery shopping and driving a car does not detract from her credibility. *See*
05 *Webb*, 433 F.3d at 688. “One does not need to be ‘utterly incapacitated’ in order to be
06 disabled.” *Id.* (quoting *Vertigan*, 260 F.3d at 1050).

07 Like other physical impairments, obesity can constitute a severe impairment, either
08 alone or in combination with other medically determinable impairments, when it “significantly
09 limits an individual’s physical or mental ability to do basic work activities.” SSR 02-01p.
10 Because obesity can cause various functional limitations, ALJs must assess precisely how a
11 claimant’s weight affect’s their ability to function in the work environment and explain how the
12 obesity limits the claimant’s ability to perform work. *Id.* On remand, the ALJ should
13 reevaluate whether plaintiff’s obesity alone or in combination with other impairments was
14 severe through her date last insured.

15 V. CONCLUSION

16 For the foregoing reasons, the Court recommends that this case be REVERSED and
17 REMANDED to the Commissioner for further administrative proceedings consistent with this
18 opinion. A proposed order accompanies this Report and Recommendation.

19 DATED this 26th day of October, 2010.

20 

21 Mary Alice Theiler
22 United States Magistrate Judge